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No. 81-202

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
*Petitioners,*

v.

CLAIBORNE HARDWARE COMPANY, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the Supreme Court of Mississippi**

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## PETITIONERS' REPLY BRIEF

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Respondent merchants do not seriously challenge our position that the First Amendment protects nonviolent activities in support of political boycotts. Nor do they assert that the few incidents of vandalism or violence occurring in Claiborne County during the time of the boycott were perpetrated by or at the direction of the organizers of the boycott. Instead, they have fallen back to an extremely narrow premise from which they seek to defend the decision of the court below. That premise is that a few incidents of vandalism or violence by unnamed persons were really "central to the success of the boycott" (Resp. Br. 1), and that all the petitioners are liable

for all the business losses from the boycott because they purportedly "acquiesced" (Resp. Br. 12) in these incidents.[1] In this reply brief we demonstrate that the merchants' premise is false, that damages cannot be awarded for the effects of protected First Amendment advocacy, and consequently that the judgment below cannot be sustained.

## I. THE MISSISSIPPI SUPREME COURT DID NOT MAKE THE FINDINGS ASCRIBED TO IT BY RESPONDENTS AND COULD NOT HAVE DONE SO ON THIS RECORD.

The merchants argue at considerable length that findings of state courts must be accepted by this Court "unless there is no evidence to support them." Resp. Br. 21-29. But it is the merchants, not petitioners, who seek to recast the factual findings of the courts below in their effort to justify the judgment of liability in this case.

*Violence was not "central to the success of the boycott."* The merchants state that the Mississippi Supreme Court found that force and violence were "central to the success of the boycott," "contribute[d] substantially to [its] success," were "a substantial and material factor in [its] success," "played an important role in [its] success," and "contributed materially to [its] success." Resp. Br. 1, 5, 17, 25, 29. There are no such "findings." The court made no findings quantifying the role that violence played in the patronage lost by the merchants because, under its erroneous view of the law, there was no need for such analysis. The Mississippi Supreme Court's theory was that the mere "presence" of violence in the community during the time of the boycott sufficed to eliminate all First Amendment protection for *all* the boy-

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[1] The merchants also assert (Resp. Br. 17-21) that even if peaceful boycott activity is protected, the NAACP is liable for all the boycott losses of the merchants because Petitioner Charles Evers, the NAACP's filed secretary in Mississippi, gave two (or three) "threatening" speeches. This argument is dealt with below at pp. 7-10.

cott activities of *all* the petitioners, even absent any proof that the petitioners participated in those acts (App. 23a):

> "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other. All of these factors are here present, and the boycott was illegally operated . . . ."

This "presence of violence" standard was not, as the merchants suggest, simply an inelegant "paraphrase of a Fifth Circuit opinion" (Resp. Br. 26) or a "failure to use certain words and phrases" (Resp. Br. 27). It was the exact and only ground of the Mississippi Supreme Court's holding.

Elsewhere in its opinion, the Mississippi Supreme Court did cite the chancellor's conclusion that "the volition of many black persons was overcome out of sheer fear." App. 20a. But part of that conclusion plainly relied upon a perception that there was fear, not of violence, but of "social ostracism, vilification, and traduction." And the number of black persons even arguably "overcome" was very small—only four are cited by the merchants. *See* Resp. Br. 39.[2] Similarly, the court's statement that intimidation, coercion, and threats "contributed" to the boycott's "almost complete success" (App.

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[2] The testimony does not support even this insignificant claim. Marjorie Brandon testified only that she heard that those who shopped in white stores would be "dealt with" or "punished." The only type of punishment she referred to was that their names would be called out "so that they would be put on a bad list in the other people's minds in their community." J.A. 219-20. Mrs. E. J. Jennings, who had heard of only one incident of violence involving those who traded in white stores, boycotted simply because she "didn't want no trouble," had heard of boycotts in Detroit, and "didn't want no risk." Although she agreed with counsel's suggestion that "you were afraid that if you didn't observe it something might happen to you," the only such fear she testified to was again the fear of being "embarrassed" and socially ostracized. J.A. 237-42.

24a) is constitutionally inadequate. No one questions that the boycott was successful, in the sense that most black citizens of Claiborne County refused to patronize white stores. The question in this case is whether they did so as a result of protected First Amendment advocacy or as a result of physical violence or the fear of such violence.

The testimony could not have supported any finding that violence and threats of violence were "central" to the boycott's effectiveness. The merchants conceded below that

> "Most of the witnesses testified that they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott." Brief for Appellees Claiborne Hardware Co. *et al.* at 12 (February 15, 1980).[3]

And, as we have noted (Pet. Br. 33 n.36), the record contains no proof that the few incidents of vandalism described by the chancellor caused even a single one of the victims to forego trade with white stores. The only specific finding made by the chancellor regarding the motivations of any black citizens of Claiborne County was with respect to the cooks employed by the defendant, Mississippi Action for Progress:

> ". . . [T]he only [MAP] cooks called to the witness stand testified that they refused to go into white-owned stores to purchase groceries for the children in the program *for the reason that they were in favor of*

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[3] Respondents acknowledge in their brief that "some" witnesses "testified that they were not afraid," but dismiss this evidence because these witnesses were "mostly the petitioners themselves." Resp. Br. 27, 38. All 106 of the defendants called as witnesses at trial, however, were called *by the merchants*, as adverse witnesses in support of the merchants' own case. Indeed, highly selected excerpts from the testimony of these 106 defendants constitutes virtually the entire case of the merchants on the "fear and violence" issue.

*the boycott and wanted to honor it.*" App. 22b (emphasis in original).[4]

*The violence in the record cannot be assumed to have been "boycott-related."* The merchants assert that any assault or act of vandalism in Claiborne County after April 1, 1966, must have been boycott-related, because there was no evidence that there was any other reason. Thus, for example, they assert that the Laura Cullins incident was boycott-related because of the absence in the record of "testimony suggesting any other possible reason for the shooting." Resp. Br. 31. The vandalizing of Muriel Cullins' car becomes boycott-related, since "[t]here was no other suggested motive." *Id.* The Gilmore incident was boycott-related because "Gilmore had broken the boycott." Resp. Br. 30. And so on. The merchants even contend that the failure to identify any individual petitioner as having committed any of these acts is "irrelevant." *See* Resp. Br. 31-33. Thus, the merchants argue here, any violent act against any black person who did not observe the boycott must be presumed to be "boycott-related" and therefore the responsibility of all petitioners. This line of argument suffers not only from an absence of logic but also, as we have observed (Pet. Br. 29-33), from the absence of findings to this effect by the chancellor. Absent some such connection, the constitutional rights of petitioners cannot be abridged by the state.

In addition, however, the merchants attempt in their brief to resurrect a number of events *never even mentioned in the opinions below* that have no significance

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[4] For excerpts of this testimony, see J.A. 431-34, 434-37. The chancellor held MAP liable on the theory that it had joined the boycott voluntarily and rejected MAP's claim that its participation had been coerced. App. 22b-23b. The Mississippi Supreme Court reversed as to MAP, accepting MAP's claim of coercion, on the basis of a "stipulation" of counsel *for the merchants* (actually only an offer to stipulate, R. 13853-54) that MAP cooks were afraid to do business with the white merchants. App. 25a-26a.

to this case. Among these "other acts of violence" (Resp. Br. 37) was a spontaneous act by a group of black students at Addison High School in June 1969, shortly after the fatal shooting of Dusty Jackson by Port Gibson police, preventing milk deliveries from Sherifff McKay's delivery man and slashing the tires on his truck. J.A. 354-69. Another was a fire in a white store. Neither of these episodes involved activity directed at black customers of white stores. A third incident involved vandalism to a car owned by Charles Davis, a black customer of white stores, but also one of the *petitioners* whom the merchants have sued for damages! In another, Emerson Davis' car was vandalized, but the vandal was never identified. J.A. 374, 376. The courts below made no mention of any of these incidents.

Some of the merchants' assertions about the record approach the limits of permitted license. One such example is their assertion that Petitioner Charles Evers organized the "Black Hats" as his "enforcers," armed with guns to prevent persons from entering white stores. Resp. Br. 9, 35-37. The chancellor did not find either that this group was organized by Evers or that they were armed while watching stores. App. 19b. It is undisputed in the record that Evers never attended "Deacons" or "Black Hat" meetings, and his testimony that he never even knew the group existed is uncontradicted. J.A. 137, 189-90, 193, 210. The record also establishes that while some Deacons (like some merchants) possessed personal firearms, they carried these weapons in guarding the First Baptist Church during Tuesday night NAACP meetings, after hearing rumors of possible church bombings by white persons. R. 3306-10; J.A. 135, 146-47, 285.[5]

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[5] The only accurate record citation provided by the merchants in support of their claim that the Deacons used weapons to guard stores (Resp. Br. 9, 36) is the testimony of Respondent Hudson that "these particular people . . . wherever they were standing," were armed "one or two different times" in 1968, "but the police stopped it." J.A. 54. Apparently Hudson could not even tell whether these

*Charles Evers' speeches were not shown to have had any connection with unlawful activity.* Ultimately, the merchants seek to portray Petitioner Evers as the chief villain in the Claiborne County boycott. It is, in fact, Evers' political oratory on the steps of the county courthouse upon which the merchants rely most heavily for their argument that fear and violence were "central to the success" of the boycott.[6] That reliance is misplaced, because it ignores the First Amendment requirement of a finding of some close nexus between the giving of a speech and subsequent unlawful activity within the power of the state to proscribe. In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), this Court held that a Ku Klux Klan speech suggesting "revengence" to an audience of hooded and armed Klansmen could not be punished absent a finding that it was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *See also Hess v. Indiana*, 414 U.S. 105, 108-09 (1973). If the merchants seek by reference to Evers' speeches to show that he incited his listeners to unlawful acts, the argument fails because the courts below never found (and could not have found) that Evers'

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were real guns or not. *See* J.A. 81. Police Chief Porter, who actively observed the day-to-day conduct of the boycott from 1966 to 1969, testified that persons watching stores were not armed as far as he knew. J.A. 112. *See also* J.A. 139 (documentary evidence that Deacons would "give respect to other people on the street").

[6] The merchants also urge, by resort to the doctrine of *respondeat superior*, that even if the remaining 90 petitioners are dismissed out by this Court, the judgment against petitioner NAACP should be affirmed "[t]o the exact extent that Evers was liable." Resp. Br. 18. Evers was not the NAACP's Field Secretary in Mississippi during all the time in question in this case. J.A. 457-58. In any event, however, the general question of when the NAACP may be liable for unlawful acts of its agents or apparent agents is not a question that needs to be resolved in this case, because the court below did not find, and could not have found on this record, that Evers was responsible for the entire boycott or for business losses due to violence.

speeches had any *Brandenburg* effect. If their point is to demonstrate that Evers put the fear of violence into the minds of his listeners, the only observation of the chancellor that could be read as a "finding" on this point is this (App. 37b-38b):

> "Unquestionably, the word 'got around' in [P]ort Gibson and Claiborne County that physical harm, as well as vilification and ostracism, could very well be the lot of any black person observed trading with whites. As a matter of fact, these things were promised by the Field Secretary of the National NAACP, Charles Evers, on at least two occasions, and it is apparent that the black people believed him."

What was "apparent" to the chancellor is not supported by a word of testimony in the record. No black person testified that he or she developed any apprehension of physical violence as a result of Evers' speeches.

It is obvious that the April 21, 1969 speech upon which the merchants have laid such heavy stress could not have been "central to the success of the boycott" that had begun three years earlier, and thus could not justify an award of damage liability for lost patronage in those years.[7] The merchants now argue that an Evers speech given two days previously, though never even mentioned by the courts below, confirms their theories about Evers. They focus on his statements that those who traded with

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[7] The chancellor was wrong in his apparent belief, based solely upon the recollection of Sheriff McKay (J.A. 83, 100-01), that the single objectionable remark of Evers in his April 1969 speech was also employed in another speech three years before. *See* App. 17b-18b & n.2. We believe that independent examination of the record on this point by this Court (*see* Pet. Br. 26 n.28) will clearly reveal the inaccuracy of McKay's recollection. Every other witness, when specifically questioned on the content of the earlier speech, had a different memory. *See, e.g.*, J.A. 43-44 (Respondent Hudson), 110-11 (Police Chief Porter). *See also* Evers' own recollection (J.A. 184-88). The Mississippi Supreme Court failed to place a date on the remark. *See* App. 19a.

white persons "are going to be in trouble," would be subject to "discipline," and "better not be caught up here." *See* Resp. Br. 35. But Evers' allusions to "discipline" in his testimony referred, not to physical violence, but to "a good tongue-lashing and embarrassing them and showing them how backwards they are to do things." J.A. 193-97.[8]

Petitioner Evers' taped and transcribed speech of April 19, 1969, speaks for itself. *See* J.A. 85-100. Fairly read in its entirety, it amounts to no more than an eloquent plea for black persons in Claiborne County to act together, through their use of "ballots and bucks" rather than "bullets," to free themselves from a heritage of discrimination and poverty. The Evers' speeches do not and cannot provide support for the merchants' notion that violence

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[8] The merchants' brief is filled with similar assertions that black persons who traded in white stores heard that they would be "dealt with" or "taken care of," or heard it was the "general opinion in the community" that persons who traded in white stores would be "punished." Resp. Br. 38. The testimony they cite was the vehicle by which vague rumor was allowed to replace proven fact as the basis for the merchants' theory of fear of violence; as the chancellor observed:

> ". . . I know of no other way that we can get these things in the record. If we went directly according to the rules of evidence, that is to say the heresay [sic] rule, I am afraid this record would be cut down to about half of what it is right now." R. 6055.

Thus, the cited testimony is that violators "would be in trouble" (J.A. 412), or "I've heard about boycotts before" (J.A. 237). Similarly vague testimony cited by the merchants appears at J.A. 172, 221, 224-25, 230-34, 259-60, 263-64, 281, 301.

The record is riddled with leading questions by counsel for the merchants about being "dealt with" or "punished" (J.A. 124, 219, 247, 288, 412) directed to defendants who often did not even understand them (*e.g.*, J.A. 224-27, 246-47). For many witnesses, being "dealt with" involved having one's name read out at NAACP meetings so that he or she would "be put on a bad list in the other people's minds." J.A. 219-21.

was "central to the success" of the boycott, and the court below never found that they were.[9]

## II. STATE COURTS MAY NOT AWARD DAMAGES FOR LOSSES CAUSED BY PROTECTED FIRST AMENDMENT ACTIVITY.

The merchants argue that even if the damage judgment in this case cannot be sustained on the theory that violence was central to the success of the boycott, the Mississippi courts were free as a matter of the state law of damages to hold petitioners liable for all the merchants' boycott losses. *See* Resp. Br. 17. The merchants' argument is simply wrong in the context of this case. Compensatory damages in tort may not lawfully be assessed for the results of protected First Amendment advocacy.[10]

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[9] In their effort to make it appear that the Port Gibson boycott was conceived in violence, the merchants place heavy reliance upon Petitioner Evers' 1971 autobiography. While excerpts from that autobiography were introduced at the trial, neither court below ever mentioned the book or the excerpts. Although the merchants assert a paragraph in that book to be a "very candid account of the boycott" (Resp. Br. 4), it is in fact a description of events in *Natchez*, Mississippi (some time before the Port Gibson boycott). J.A. 200-01. For Evers' actual account of the Port Gibson boycott, see C. EVERS, EVERS 176-81 (1971).

The merchants' efforts at trial to convert references in Evers' book about "disciplin[ing] our own people" into trial testimony that Evers engaged in unlawful activity in Port Gibson (or anywhere else) were completely unsuccessful. Evers testified that he never urged physical violence against nonparticipants in the boycott. J.A. 195-97, 201-07.

[10] The merchants also argue that "[a] state court is not constitutionally required to limit the *penalties* it imposes for unprotected conduct to the actual amount of the damage thereby occasioned." Resp. Br. 17 (emphasis supplied). That is a constitutional question not before this Court. As the merchants acknowledge (Resp. Br. 5, 9), the judgment in this case does not purport to be an award of liability in punitive damages for unlawful conduct; it purports to be an award purely "compensatory" in nature for all losses that resulted "from the boycott." App. 35a. *Ramsey v. United Mine*

The merchants argue that the decisions of this Court limiting liability to the effects of unlawful conduct are inapplicable because they are not First Amendment cases. Yet the actions immunized from Sherman Act liability in *United Mine Workers v. Pennington*, 381 U.S. 657, 671-72 (1965), were protected from liability in part because they implicated the First Amendment's right to petition governmental officials for redress of grievances. *See Eastern Railroad Presidents Cnoference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). In any case, if this Court requires state courts to limit tort liability to the actual results of violence by unions on the picket line in order to avoid "arguable" conflict with federal labor policies,[11] surely no less stringent rule applies to

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*Workers*, 401 U.S. 302 (1971), is thus irrelevant to this case. The fact that Congress has seen fit to impose treble damages for violations of the federal antitrust laws hardly means that Mississippi courts can constitutionally award compensatory damages for the effects of First Amendment advocacy, especially where such advocacy was found to be exempt from state antitrust laws because of its "political goals." App. 28a.

[11] *See United Mine Workers v. Gibbs*, 383 U.S. 715 729-35 (1966); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, holding that state courts were powerless to award tort damages for conduct "arguably" protected or prohibited by federal labor law, this Court specifically distinguished its prior decisions permitting recovery in tort for damages "directly and proximately caused" *solely* by violence. *Id.* at 248 n.6.

The merchants note that *Mead v. Retail Clerks Local 839*, 523 F.2d 1371 (9th Cir. 1975), applied *Gibbs*, *supra*, to permit recovery under Section 303 of the Labor Management Relations Act for all business losses suffered by the plaintiff where unlawful secondary pressure "materially contributed" to the injury. Resp. Br. 16. While no such finding with respect to unlawful conduct was made in this case, the Ninth Circuit's *Mead* doctrine is inapplicable in any case. First, it was an interpretation of a federal statute informed by "Congress' object and purpose" in that statute, 523 F.2d at 1376, which is not applicable here. Second, it permitted recovery only because the consequences of primary and secondary picketing "are not separable, and the damages cannot be apportioned." *Id.* at 1378-79. This finding of inseparability was premised upon the fact that under

state tort judgments awarding damages for the results of nonviolent political boycott activity concededly entitled to First Amendment protection. State restrictions upon speech, petition, and assembly—whether by statute, by injunction, by tort liability, or by any other form of state action under the Fourteenth Amendment—may be sustained only by precisely drawn, least restrictive means of serving compelling state interests. *E.g.*, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980).

The merchants actually concede the application of these principles to the injunction granted below. Although they previously insisted that the injunction was moot, they now "have no objection" to a modification of the injunction that would enjoin only "acts of violence and . . . threats of physical violence." Resp. Br. 48. But they assert that "a state court judgment granting compensatory damages in a civil case for actual economic losses does not pose the same threat to First Amendment values as a prior restraint or as a criminal conviction." Resp. Br. 9. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964), a civil damage suit for libel, this Court rejected just such an argument, noting that the chill to future exercise of First Amendment rights created by the prospect of substantial damage judgments may be even greater than that posed by the fear of criminal punishment. As Respondent Dobbs admitted, this lawsuit was filed precisely in order "to keep another boycott from ever happening again in Port Gibson." J.A. 421. And, according to the testimony of the national director of branches and supervisor of the field staff for Petitioner NAACP, Mississippi membership in the NAACP in fact plunged from 15,223 to 8,276 during the year following the filing of this well-publicized suit—a drop attributed directly to the potential liability threatened by this action. J.A. 443.

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the peculiarities of federal labor law *the very same picketing activity* had both lawful (primary) and unlawful (secondary) objects. *Id.* at 1378.

## III. PETITIONERS HAVE NO VICARIOUS LIABILITY THROUGH PURPORTED "ACQUIESCENCE" IN UNLAWFUL ACTS.

As noted in our opening brief (Pet. Br. 34-36), there is no evidence in the record with respect to the vast majority of the 92 petitioners that they intended anything other than to exercise their constitutional and civil rights by joining in peaceful forms of First Amendment speech, petition, and assembly and by withholding their patronage from the merchants. The merchants apparently acknowledge that the court below failed to find that any of these Petitioners had the specific intent to further the boycott by unlawful means.[12] They assert instead that requiring more than "general intent"—whatever that may mean—would serve to "unconstitutionalize the traditional rules of evidence and procedure . . . in the state courts." Resp. Br. 15. This argument is not only inaccurate but beside the point. The specific intent requirement, which has been well established for over 20 years, does not regulate rules of evidence or procedure in state courts. It does, in a sense, "constitutionalize" the substantive showing of participation in unlawful acts necessary to establish liability in political association cases, by demanding more than a showing of mere membership in a common political group. But this is no more than a rule of constitutional law developed by this Court to safeguard rights of political as-

[12] The merchants do, however, mislead this Court by their suggestion that the Mississippi Supreme Court engaged in "a thorough review of the record" as to the intent and level of participation of the other defendants below. Resp. Br. 12, 39-40. The list of defendants dismissed out by the Mississippi Supreme Court was taken verbatim from petitioners' brief below, which identified, by way of example, a number of defendants as to whom there was absolutely no mention in the record, as to whom the only evidence was their individual refusal to patronize the merchants' stores, or as to whom the only evidence was membership in the NAACP or attendance at NAACP meetings. *Compare* Brief of Appellants NAACP and All Individual Appellants 22-23 & nn.25-27 (August 29, 1979), *with* App. 26a.

sociation. In cases involving associations of persons engaged in protected First Amendment activity with others arguably engaged in illegal conduct, liability may not be established by proof of common affiliation alone, because to do so would impose unacceptable obstacles to the exercise of speech and associational rights. As Justice Harlan observed in *Noto v. United States*, 367 U.S. 290, 299-300 (1961):

> ". . . this element of the membership crime, like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."

The merchants' argument that all these petitioners were liable because they knew of violence, "acquiesced" in it, and failed to "disassociate themselves from the threats and violence or perhaps even to try to stop them" (Resp. Br. 12, 39), cannot be squared with the commitment to freedom of association made by this Court in *Noto*. Although many petitioners had no knowledge of the existence of or motive for the sporadic acts of violence in Port Gibson (Pet. Br. 28), mere knowledge of unlawful activity would not satisfy the constitutional standard in any event. *Keyishian v. Board of Regents*, 385 U.S. 589, 606-07 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 16 (1966); *see Healy v. James*, 408 U.S. 169, 186 (1972). The rule advanced by the merchants would require anyone engaging in a civil rights boycott to stop boycotting (to begin making purchases) immediately upon learning (or being placed on notice) of any incidents of unlawful conduct by others in the same county. The decisions of this Court support no such rule, and it should be rejected here.

## CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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